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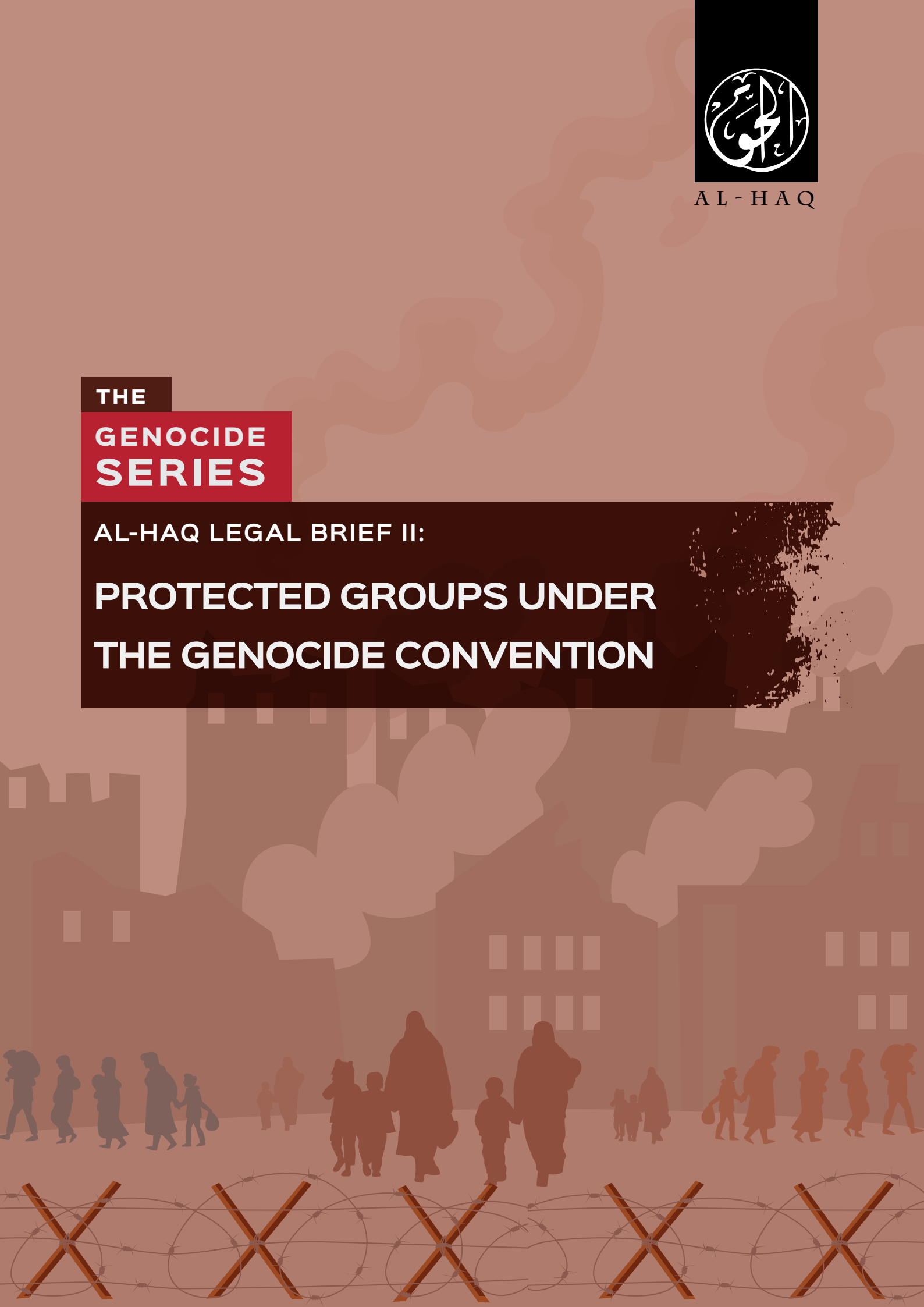
AL-HAQ LEGAL BRIEF II:

PROTECTED GROUPS UNDER THE GENOCIDE CONVENTION



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INTRODUCTION

The prohibition against genocide has as its aim and purpose the prevention of the intentional destruction of groups.[1] Consequently, genocide is defined as a range of acts, committed against a group, in whole or in part, or the members thereof, if done so with the intent to destroy that group in whole or in part.[2]

Part I of this brief defines the types of groups protected by the Genocide Convention, and the debate surrounding their definition. It addresses the exclusion of certain groups from the definition of protected groups under the convention **(part a)**, whether a group must be negatively or positively defined **(part b)**, and whether the group must be defined by objective, or subjective, criteria **(part c)**.

Part II elaborates on the scope of groups, or their part, against whom the intent to destroy must be directed to meet the criteria for establishing the presence of the *dolus specialis* of genocide.

I. DEFINITION OF THE PROTECTED GROUP

It has been claimed that the "major problem with the [Genocide] convention is its narrow definition of what constitutes a victim group".[3] Indeed, the Convention on the Prevention and Punishment of the crime of Genocide — and later the Rome Statute — both identified four types of groups: *"genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."*[4]

However, neither treaties nor case law provide a precise or definitive definition as to what constitutes a protected group[5] — this is in part because the concepts of national, ethical, racial and religious group are themselves imprecise, and they **must be assessed in consideration of the context**. The International Criminal Tribunal for Rwanda (ICTR) first sought to define the four protected groups in its *Akayesu* judgment, in 1998:

> Definition of a national group: "(...) *a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.*"[6]

1 See *e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)(Bosnia v. Serbia), Judgment, I.C.J. Reports 2007,* p. 126, para. 198: "…the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups…".

2 Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article II; Rome Statute (1998), Article 6; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Article 4(2); Statute of the International Criminal Tribunal for Rwanda, Article 2(2).

3 Chalk, Frank and Jonassohn, Kurt. *The History and Sociology of Genocide*, (New Haven/ London, Yale University Press, 1990), p. 11, cited in International Crimes Database (ICD), Carola Lingaas, *Defining the Protected Groups of Genocide through the Case Law of International Courts* (December 2015), ICD Brief 18, https://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf, p. 2.

4 Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article II *and* Rome Statute (1998), Article 6; Statute of the ICTY, Article 4 (2); Statute of the ICTR, Article 2 (2).

5 Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide,* UN Doc. E/CN.4/Sub.2/1985/6 (2 July 1985), https://undocs.org/E/CN.4/Sub.2/1985/6, para. 30:

"[t]he lack of clarity about which groups are, and are not, protected has made the Convention less effective and popularly understood than should be the case".

Hopkins, Alison. "Defining the Protected Groups in the Law of Genocide: Learning from the Experience of the International Criminal Tribunal for Rwanda" Volume 19, *Dalhousie Journal for Legal Studies* (January 2010):

"Groups are an intersection of both true and artificial differences; they evade easy classification. This does not mean, prima facie, that they will not be protected. (...) The 1948 Genocide Convention must be interpreted in a way that empowers the international community to prevent and protect, while upholding genocide as "the crime of crimes."

6 *The Prosecutor v. Akayesu,* Trial Chamber I, Judgment, ICTR-96-4-T (2 September 1998) (*Akayesu,* Trial Judgment), paras. 512-515.

> Definition of an ethnic group: *"An ethnic group is generally defined as a group whose members share a common language or culture."*[7]
>
> Definition of a racial group: *"The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."*[8]
>
> Definition of a religious group: *"The religious group is one whose members share the same religion, denomination or mode of worship."*[9]

However, as the Trial Chamber of the ICTR noted in the *Rutaganda* Case:

> *"The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context."*[10]

Subsequent Court rulings appear largely consistent with this approach.[11]

A. The exclusion of other categories of protected groups

Several groups have notably not been explicitly included in the specific definition laid down by the Genocide Convention. These include *inter alia* political groups, social, linguistic, economic or tribal groups.[12] Nevertheless, in General Assembly Resolution 96(1) of 1946, the General Assembly explicitly defined genocide and the groups protected against it in a broader fashion than the Convention later would (emphasis added):

> *Genocide is a denial of the right of existence of entire human groups…such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political* ***and other groups*** *have been destroyed, entirely or inpart.*[13]

7 *Ibid*., para. 513.

8 *Ibid*., para. 514.

9 *Akayesu,* Trial Judgment, paras. 512-515.

10 *The Prosecutor v. Rutaganda,* Trial Chamber, Judgment, ICTR-96-3-T (6 December 1999) (*Rutaganda*, Trial Judgment), para. 56. See also *Prosecutor v. Krstić*, Trial Chamber, Judgment, IT-98-33-T (2 August 2001) (*Krstić*, Trial Judgment), para. 555.

11 See *Krstić,* Trial Judgment, paras. 556-559; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, ICC-02/05-01/09 (4 March 2009), paras. 136-137:

> *"the Majority finds that there are reasonable grounds to believe that this question [whether any of the three said groups is a distinct ethnic group] must be answered in the affirmative as there are reasonable grounds to believe that each of the groups (the Fur, the Masalit and the Zaghawa) has its own language, its own tribal customs and its own traditional links to its lands"*

and fn. 152:

> *"The Majority notes that neither the Statute nor the rules provide for a definition of "ethnic group". The Majority also observes that international case law has not provided either a clear definition of what an 'ethnic Group' is."*

12 Schabas, William A. *Genocide in International Law: The Crime of Crimes*, (Cambridge, Cambridge University Press, Second Edition, 2009) pp. 150-151. See also, on whether "tribal groups" constitute protected groups, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004*, S/2005/60 (1 February 2005), paras. 495-497:

> *"In other words, tribes as such do not constitute a protected group…It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups — whatever their magnitude — which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness. In sum, tribes may fall under the notion of genocide set out in international law only if, as stated above, they also exhibit the characteristics of one of the four categories of group protected by international law".*

13 United Nations General Assembly (UNGA), Resolution 96(I), *The Crime of Genocide,* A/Res/96(1) (11 December 1946), https://docs.un.org/en/A/RES/96(I).

Note also that domestic Courts may find acts constitute genocide when committed with the intent to destroy other groups than solely those groups explicitly enumerated in the Genocide Convention, following **national legislation** that may have adopted wider formulations.[14]

Political groups: Some of the largest debates about groups — and whether their intentional destruction constitutes genocide or not — revolve around political groups. During the drafting of the Genocide convention, the debate about the inclusion of political groups as a protected group was regarded as a central question when the draft came before the Sixth Committee.[15] Ultimately, the view prevailed among delegates that **political groups** should be excluded as they lacked homogeneity and stability.[16]

This issue came to the fore in — for example — the genocide and extermination conducted by the Khmer Rouge regime in Cambodia. While the regime targeted groups defined by political and social characteristics (*i.e.,* based on class, ideology, geographic area and political affiliation), such annihilations by the regime of fellow Cambodians on political and other grounds were not charged as genocide by the Extraordinary Chambers in the Courts of Cambodia (EEEC).[17]

Significant debate continues to exist, however, on the appropriateness of excluding political groups from the definition of genocide.[18] Some scholars support the notion that, as a matter of *jus cogens*, the prohibition of the crime of genocide includes political groups or any other threatened groups.[19] This vision has not yet been echoed in judgments or opinions of international courts or tribunals.

"Any stable and permanent group": In 1998, the ICTR — commenting on the Genocide Convention — provided a definition of the protected groups in line with what it perceived to be the Convention's original object and purpose (emphasis added):

> *"[...] In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux preparatoires, was patently to ensure the protection of* ***any stable and permanent group****."*[20]

This approach allowed the Court to treat the Tutsi population in Rwanda as a separate group, irrespective of their common language and culture with the Hutu population.[21] It was not followed by other decisions.[22]

14 Cryer, Robert; Robinson, Darryl and Vasiliev, Sergey. *An Introduction to International Criminal Law and Procedure*, (Cambridge, Cambridge University Press, 4th edition, 2019), p. 211. See also France, Code Penal, Article 211-1, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006417533/2024-01-14 (unofficial translation):

> *…aimed at the total or partial destruction of a national, ethnic, racial or religious group, or of a group determined on the basis of any other arbitrary criterion…".*

15 Van Schaak, Beth. "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", 106 (7), *Yale Law Journal* (1997); Draft Convention on Genocide, U.N. GAOR 6th Comm., 3d Sess., 63d mtg., A/760 (3 December 1948), https://undocs.org/A/760, paras. 10 and 21; *Prosecutor v. Stakić*, Trial Chamber II, Judgment, IT-97-24-T (31 July 2003) (*Stakić*, Trial Judgment), paras. 21-22.

16 *Ibid*.

17 Extraordinary Chambers in the Courts of Cambodia (ECCC), *Guide to the Extraordinary Chambers in the Courts of Cambodia Volume 2: Jurisprudence* (2024), Advanced Copy, https://www.eccc.gov.kh/sites/default/files/Guide_to_the_ECCC_Volume_2_advance_copy.pdf, pp. 51-53; ICD, Mélanie Vianney-Liaud, *Controversy on the Characterization of the Cambodian Genocide at the Extraordinary Chambers in the Courts of Cambodia* (October 2014), ICD Brief 8, https://www.internationalcrimesdatabase.org/upload/documents/20141022T141836-ICD%20Brief%20-%20Vianney-Liaud_FINAL%20VERSION.pdf, pp. 11-15.

18 Schabas, William A, *Genocide in International Law: The Crime of Crimes*, pp. 150-151; Nersessian, David L. *Genocide and Political Groups* (Oxford, Oxford University Press, 2010). See also, *e.g.* Bedau, Hugo A., "Genocide in Vietnam? The line between legal argument and moral judgment, Worldview" 17(2) (1974), https://carnegiecouncil-media.storage.googleapis.com/files/v17_i002_a010.pdf; Bachman, Jeffrey S. *The United States and Genocide: (Re)defining the Relationship* (Routledge, New York, 2018).

19 Van Schaak, Beth. "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot".

20 *Akayesu*, Trial Judgment, para. 516. See also *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004*, S/2005/60 (1 February 2005), paras. 498-501.

21 ICD, Carola Lingaas, *Defining the Protected Groups of Genocide through the Case Law of International Courts* (December 2015), ICD Brief 18, https://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf, pp. 6-7.

22 Cryer, Robert; Robinson, Darryl and Vasiliev, Sergey. *An Introduction to International Criminal Law and Procedure*, pp. 210-211.

Scholars and Courts have favoured the "ensemble" approach, which suggests that, rather than searching for separate definitions, it is preferable to view the groups "*as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection*".[23]

B. The groups must be defined positively:

In the *Jelisić* Case, the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted a 'negative approach', which it explained as:

> *identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.*[24]

The Trial Chamber deemed that this approach accorded most with the object and purpose of the Genocide Convention, which also sought to protect groups where they had been stigmatised and excluded by perpetrators in such a particular way.[25]

This 'negative approach' has since been overruled by later judgments of both the ICTY and the International Criminal Court (ICC). The ICTY Appeals Chamber, in the *Stakić* Case came to the conclusion that the elements of genocide had to be considered positively in relation to Bosnian Muslims and Bosnian Croats rather than negatively in relation to "non-Serbs".[26] The ICC Pre-Trial Chamber has confirmed this approach, stressing that "*the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof … It is, therefore, a matter of who the targeted people are, not who they are not.*"[27] This approach was also upheld by the International Court of Justice in its 2007 judgment on the Bosnia Genocide Case, with the Court stating: "*It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them*." [28]

23 Schabas, William A., p. 129. See also *Krstić*, Trial Judgment, para. 556:

> *"[the list of groups] was designed more to describe a single phenomenon, roughly corresponding to […] 'national minorities', rather than to refer to several distinct prototypes of human groups" and that "[t]o attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention."*

24 *Prosecutor v. Jelisić*, Trial Chamber, Judgment, IT-95-10-T (14 December 1999) (*Jelisić*, Trial Judgment), para. 71.

25 *Ibid*.

26 *Prosecutor v. Stakić*, Appeals Chamber, Judgment, IT-97-24-A (22 March 2006) (*Stakić*, Appeal Judgment), paras. 16-28. See also *Prosecutor v. Radovan Karadžić*, Trial Chamber, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV, IT-95-5/18-T (24 March 2016) (*Karadžić*, Trial Judgment), para. 541.

27 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, ICC-02/05-01/09 (4 March 2009), para. 135.

28 *Bosnia v. Serbia*, *Judgement of 26 February 2007*, para. 193.

C. Must the group be defined by objective, or subjective, criteria?

A further central question of debate is whether the protected groups should be identified by reference to their objective criteria, or by reference to subjective criteria.

The objective approach: In its first judgment –– the *Akeyasu* Case, the ICTR adopted an objective approach to determining protected groups:

> *(...) a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.*[29]

To determine what constitutes a national, religious, racial or ethnic group, *ad hoc* tribunals have used different objective evidence, such as the sharing of legal bonds, reciprocity of rights and duty,[30] the sharing of hereditary physical traits[31] or of a common language and culture.[32]

The subjective approach: The wholly objective approach has however been criticized for its narrowness, both in ICTY and in other ICTR judgments:

> *to attempt to define a national, ethnic or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. (...) Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. It is the stigmatization of a group (...) by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.*[33]

In *Kayishema and Ruzindana*, a different ICTR Trial Chamber adopted a purely subjective approach in relation to an ethnic group, stating it could be (emphasis added): "*a group which distinguishes itself, as such (**self-identification**); or, a group identified as such by others, including perpetrators of the crime (**identification by others**).*"[34] In *Bagilishema* the ICTR again stressed that such perception could also be significant:

> *the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.*[35]

29 *Akayesu*, Trial Judgment, para. 511.

30 *Ibid*., para. 512.

31 *The Prosecutor v. Kayishema and Ruzindana,* Trial Chamber II, Judgment, ICTR-95-1-T (21 May 1999) (*Kayishema and Ruzindana*, Trial Judgment), para. 98.

32 *Akayesu*, Trial Judgment, para. 513.

33 *Jelisić*, Trial Judgment, para. 70. See also *Krstić*, Trial Judgment, paras. 557 and 559; *Rutaganda,* Trial Judgment, para. 56; Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/32/CRP.2 (15 June 2016), paras. 100-105, esp. para. 104.

34 *Kayishema and Ruzindana*, Trial Judgment, para. 98. See also *Rutaganda*, Trial Judgment, para. 55:

> *"[...] the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group."*

35 *The Prosecutor v. Bagilishema*, Trial Chamber I, Judgment, ICTR-95-1A-T (7 June 2001) (*Bagilishema*, Trial Judgment), para. 65.

This discussion was especially relevant in the context of Rwanda as Hutu political opponents to the regime had also been targeted for extermination — including under the perception that they were Tutsi. While the ICTR acknowledged that those circumstances may be taken into account, it highlighted they did not suffice to characterise the killing of Hutu political opponents as genocide (as opposed to a crime against humanity), but also found, simultaneously, that such killings did not mitigate a finding of genocide (and genocidal intent) against Tutsis.[36]

A consensual case-by-case approach: The ICTR and ICTY eventually settled on a position whereby the determination of a protected group is (emphasis added): *"to be assessed **on a case-by-case basis** by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators."*[37]

In 2009, the ICC Pre-Trial Chamber followed this case-by-case approach, highlighting that the ICJ —in its Bosnia Genocide Case — left the question open as to "*whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted*".[38]

36 *The Prosecutor v. Nchamihigo,* Trial Chamber III, Judgement and Sentence, ICTR-01-63-T (12 November 2008) (*Nchamihigo*, Trial Judgment), para. 338.

37 *The Prosecutor v. Semanza,* Trial Chamber III, Judgment and Sentence, ICTR-97-20-T (15 May 2003) (*Semanza*, Trial Judgment), para. 317. See also *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, IT-02-60-T (17 January 2005) (*Blagojević and Jokić*, Trial Judgment), para. 667. *The Prosecutor v. Kajelijeli*, Trial Chamber II, Judgment and Sentence, ICTR-98-44A-T (1 December 2003) (*Kajelijeli,* Trial Judgment), para. 811; *Prosecutor v. Brđanin*, Trial Chamber II, Judgment, IT-99-36-T (1 September 2004) (*Brđanin*, Trial Judgment), para. 684.

38 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, ICC-02/05-01/09 (4 March 2009), para. 137, ftn. 15. See also Separate and Partly Dissenting Opinion of Judge Anita Usacka, para. 23.

II. ESTABLISHING GENOCIDAL INTENT

A. Destroying the group: "in whole or in part"

In order to make a finding of genocide, any Court needs to establish that the acts enumerated in the Convention (Art. 2) were conducted with the requisite genocidal intent, i.e., "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[39] The phrase "in whole or in part" establishes that the intent to destroy a group does not necessarily need to be directed at the entire group, but may also be directed to only a part of it.[40]

The ICTY clarified the meaning of "part" as:

> *mean[ing] seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.*[41]

Where the intent is directed against part of the group, any Court has to however first define the group as a whole. A Court would then have to elaborate on what test it uses, and its outcome, to determine that a collective of members from that group constitutes "a part" for the purpose of assessing the presence of genocidalintent.[42]

Substantial part: In that regard, Courts have consistently clarified that the part of the group against which the intent to destroy is directed must constitute a **substantial part** of that group. The ICJ explained that such a test:

> *is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.*[43]

To assess whether a collective of members constitute a substantial part of a group, both a quantitative as qualitative test is required.[44] The quantitative criterion involves **the numeric size** of the targeted part relative to the total size of the group.[45] The qualitative criterion involves the **significance** that the effective destruction of the targeted part would have to the overall group:

39 Genocide Convention, Article II.

40 See *e.g. Jelisić,* Trial Judgment, para. 80.

41 *Krstić*, Trial Chamber, para. 590.

42 Mettraux, Guénaël. *International Crimes: Law and Practice, Volume I: Genocide* (Oxford, Oxford University Press, 2019), p. 180, section 8.3.2.2.

43 *Bosnia v. Serbia*, *Judgement of 26 February 2007*, para. 198; *Prosecutor v. Krstić*, Appeals Chamber, Judgment, IT-98-33-A (19 April 2004) (*Krstić*, Appeal Judgment), paras. 8-9 and 12; *Bagilishema*, Trial Judgment, para. 64.

44 *Prosecutor v. Popović et al.,* Appeals Chamber, Judgment, IT-05-88-A (30 January 2015) (*Popović et al.*, Appeal Judgment), para. 422:

> *"... it is the objective, contextual characteristics of the targeted part of the group, including, inter alia, its numeric size relative to the total size of the group, that form the basis for determining whether the targeted part of the group is substantial*".

See also *Kayishema and Ruzindana*, Trial Judgment, paras. 96-96:

> *""in part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence, both proportionate scale and total number are relevant."*

45 *Ibid.*

> *The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. (...) If a specific part of the group is* ***emblematic of the overall group, or is essential to its survival****, that may support a finding that the part qualifies as substantial.*[46]

Such a "significant" part of the group could consist of, for example, its leadership, which may include "political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others" who play a significant role or are fundamental for the physical survival of the group and whose elimination could in turn impact on the group as a whole.[47]

The 'significance' finding was particularly relevant in relation to the Bosnian Muslim population of Srebrenica. The overall protected group was the Muslim population of Bosnia. The targeted part was the Bosnian Muslim population in Srebrenica. That targeted population numbered around 40,000 persons prior to the capture of Srebrenica by the Republika Srpska forces (VRS). While this constituted only a small percentage of the overall Muslim population of Bosnia, the ICTY nonetheless found it a significant part of that group. This was due to Srebrenica's strategic importance both for the Bosnian Serb leadership —– which wanted to establish a viable Serb political entity in Bosnia —– as for the Bosnian Muslim leadership:

> *The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.*[48]

Geographically limited area: In 2007 and 2015, the ICJ reaffirmed the ICTY's substantiality test.[49] The Court also observed that (emphasis added): "*it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group* ***within a geographically limited area***".[50]

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46 *Krstić*, Appeal Judgment, para. 12. See also *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 201; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, paras. 142 and 406; *Prosecutor v. Popović et al.*, Trial Chamber II, Judgment, IT-05-88-T (10 June 2010) (*Popović et al.,* Trial Judgment), paras. 864-865.

47 *Jelisić,* Trial Judgment, para. 82; *Prosecutor v. Tolimir,* Appeals Chamber, Judgment, IT-05-88/2-A (8 April 2015) (*Tolimir,* Appeal Judgment), para. 269; See also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),* S/1994/674 (27 May 1994) (ICTY experts report), https://undocs.org/S/1994/674, para 94:
"If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others - the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose. Similarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide."

48 *Krstić*, Appeal Judgment, para. 15.

49 *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 201; *Croatia v. Serbia, Judgment of 3 February 2015*, para. 142.

50 *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 199; *Croatia v. Serbia, Judgment of 3 February 2015*, paras. 142 and 406. See also *Krstić*, Trial Judgment, para. 589:
"Several other sources confirm that the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterised as genocide. The United Nations General Assembly characterised as an act of genocide the murder of approximately 800 Palestinians detained at Sabra and Shatila, most of whom were women, children and elderly. The Jelisić Judgement held that genocide could target a limited geographic zone. Two Judgements recently rendered by German courts took the view that genocide could be perpetrated within a limited geographical area. The Federal Constitutional Court of Germany, in the Nikola Jorgić case, upheld the Judgement of the Düsseldorf Supreme Court, interpreting the intent to destroy the group "in part" as including the intention to destroy a group within a limited geographical area. In a Judgement against Novislav Djajic on 23 May 1997, the Bavarian Appeals Chamber similarly found that acts of genocide were committed in June 1992 though confined within the administrative district of Foca."

In that regard, the ICJ also observed that the "*area of the perpetrator's activity and control are to be considered".*[51] Meaning genocide may be established where the intent is to destroy the group within a limited geographical area, **depending on the opportunity available to the perpetrator**.[52] The Trial Chamber in the *Krstić* Case clarified that **the total context remained important**:

> *A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.*[53]

In other words, the targeted part is significant in that, upon its destruction, the group cannot re-establish itself on the same territory.[54]

In their interventions in *South Africa v. Israel* and *The Gambia v. Myanmar*, several States stressed the importance of the above case-law and advocated a combined approach to determining whether a part of a group constitutes a "substantial" part for the purpose of assessing the presence of genocidal intent.[55]

51 *Bosnia v. Serbia, Judgement of 26 February 2007*, para. 199.

52 *Ibid*., para. 200. *Krstić*, Trial Judgment, para. 589.

53 *Krstić,* Trial Judgment, para. 590.

54 *Ibid*., para. 597.

55 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Déclaration d'Intervention Déposée par la République Démocratique de Congo en Vertu de l'Article 63 du Statut de La Cour Internationale de Justice*, https://icj-cij.org/sites/default/files/case-related/178/178-20241211-int-01-00-fr.pdf, paras. 91-92 (translation by the Court, https://icj-cij.org/sites/default/files/case-related/178/178-20241211-int-01-00-en.pdf):

> "…*Moreover, a "substantial part" of the protected group requires a reasonable interpretation combining several approaches based in particular on quantitative, qualitative and geographic factors*."

See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention of Spain under Article 63 of the Statute of the International Court of Justice,* https://www.icj-cij.org/sites/default/files/case-related/192/192-20240628-int-01-00-en.pdf, para. 21:

> "…"Palestinians in Gaza" are unquestionably "a part" of the group of "the Palestinians", as they also meet all of the requirements established in jurisprudence: they constitute a substantial part of a particular group, they are located in a geographically limited area, they are in an area controlled by the alleged perpetrator of the crime and they may be distinguished from the rest of the group, which is to say that the perpetrators can identify them as a separate entity to be destroyed as such. In fact, the Court, in its orders on provisional measures, has always used the expression "the Palestinians in Gaza"".

South Africa v. Israel, Declaration of Intervention by the Republic of Chile, https://www.icj-cij.org/sites/default/files/case-related/192/192-20240912-int-01-00-en.pdf, para. 27; *South Africa v. Israel, Declaration of Intervention by the Republic of Colombia,* https://www.icj-cij.org/sites/default/files/case-related/192/192-20240405-int-01-00-en.pdf, para. 117.

CONCLUSION

In order to find that a State or person has committed genocidal acts with the requisite genocidal intent, any competent authority or Court must determine who the targeted group is overall, and whether it constitutes a protected group under the applicable prohibition on genocide. Where only a part of the group is targeted — it must determine whether that targeted part constitutes a substantial part of the group.

In its Provisional Measures Order of 26 January 2024 in *South Africa v Israel,* the ICJ took the position that Palestinians in Gaza constituted a substantial part of an overall "national, ethnical, racial or religious group":[56]

> *"The Palestinians appear to constitute a distinct "national, ethnical, racial or religious group", and hence a protected group within the meaning of Article II of the Genocide Convention. The Court observes that, according to United Nations sources, the Palestinian population of the Gaza Strip comprises over 2 million people. Palestinians in the Gaza Strip form a substantial part of the protected group".*

However, the Court did not yet establish the nature of the overall Palestinian group, its precise scope, nor did it precisely indicate its reasoning on substantiality — although it appears to have leaned towards a quantitative approach. These may be addressed by the Court in the further proceedings on the merits.

56 *South Africa v. Israel, Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024*, p. 3, para. 45.

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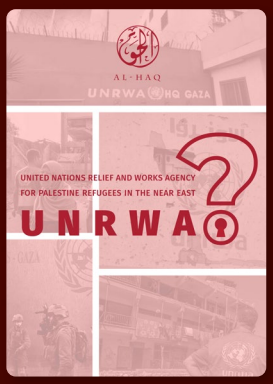

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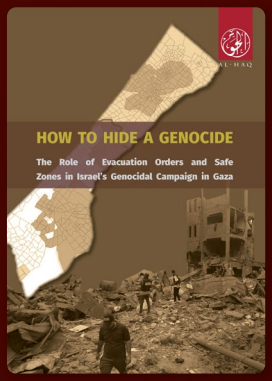

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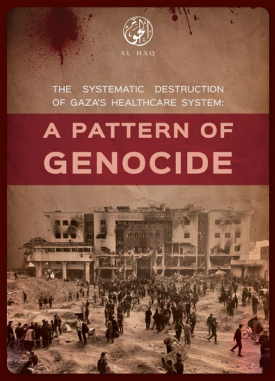

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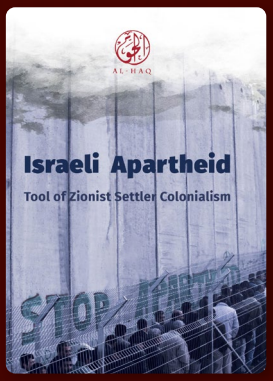

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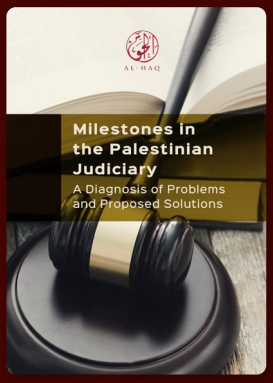

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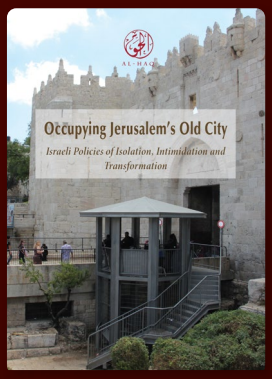

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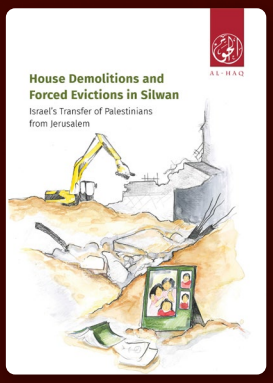

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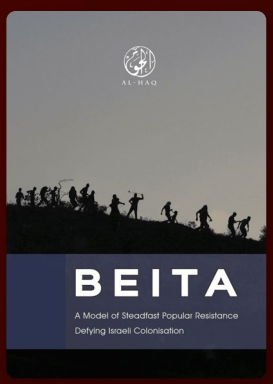

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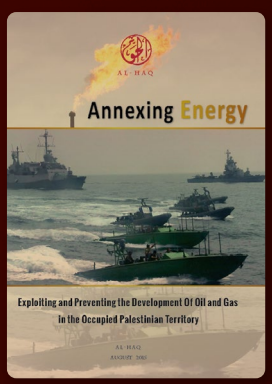

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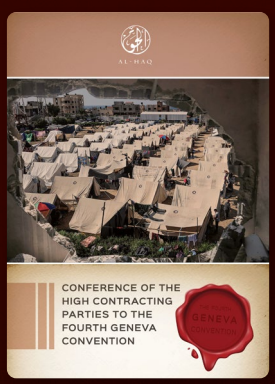

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AL-HAQ

About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net – The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability. Al-Haq was awarded the prestigious Bruno Kreisky Prize and the MESA Academic Freedom Award in 2022.